No. 2478

In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE TRINITY GOLD DREDGING AND HYDRAULIC COMPANY (a corporation),

Appellant,

vs.

ANGELE BEAUDRY, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually,

Appellees.

BRIEF FOR APPELLEES

THOMAS B. DOZIER,
Attorney for Appellees.

Filed this.....day of November, 1914.

FRANK D. MONCKTON, Clerk.

By.....

Deputy Clerk.

In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE TRINITY GOLD DREDGING AND HYDRAULIC COMPANY (a corporation), *Appellant,* vs. ANGELE BEAUDRY, as executrix of the last will and testament of Frederic Beaudry, deceased, and Angele Beaudry, individually, *Appellees.*	No. 2478

BRIEF FOR APPELLEES

An examination of the forty-three page Brief of the attorneys for the appellant has not caused us to change our views as to the correctness of the Order Granting Defendants' Motion to Dismiss the Amended Bill of Complaint.

We can not concur in the proposition that the Appellant's Amended Bill of Complaint sets up a cause

of action for the rescission of a Contract of Sale; and, on the contrary, we assert that the Amended Bill of Complaint utterly fails to set forth a cause of action for the rescission of the Contract of Sale, and discloses that the appellant was not entitled to rescind the contract upon any ground whatsoever.

The authorities which are cited and quoted in the Appellant's Brief are not applicable, with few exceptions, to the case at bar, and do not support the appellant in its contention that it was entitled to rescind the Contract of Sale.

The appellees contend:

First. That the appellant was not entitled, under the terms of the contract itself or otherwise, to rescind the Contract of Sale;

Second. That in attempting to rescind the Contract of Sale the appellant did not substantially comply with the rules governing rescission;

Third. That the appellant was guilty of laches in that it did not attempt to rescind promptly upon discovering the facts claimed by it to entitle it to a rescission of the Contract of Sale.

If the first proposition is determined favorably to the appellees' contention, then discussion or consideration of the second and third propositions becomes unnecessary.

The appellant bases its claim of right to rescind upon the failure of title to a portion of the *properties*

involved in the Contract of Sale; claiming that Beaudry undertook to convey perfect title to the ground or realty embraced within the boundaries of the mining claims. The appellant has cited numerous authorities in support of the proposition that the vendor, under an agreement to sell *land*, is required to convey to the vendee *title* to the *land* or *realty*, and that the vendor must have a valid *title* to the *land* which he agrees to convey. With this line of authorities we have no fault to find, because we believe they do state the general rules for the interpretation of contracts to convey *land* or *realty;* but we do assert that such authorities are not applicable to the question now before the Court and do not apply to contracts for the conveyance of *unpatented mining claims.*

The question for consideration is: What obligation rested upon Beaudry as to the conveyance of the unpatented mining claims; and what was the intention of both of the parties to the Contract of Sale of the properties enumerated?

We respectfully submit that, in so far as the unpatented mining claims are concerned, Beaudry never manifested any intention to convey the ground or the realty, but only agreed to convey his interest, which was a possessory interest, in and to each and all of the unpatented mining claims.

An examination of the agreement, as contained on pages sixty-seven to seventy-four of the Transcript

of Record herein, clearly discloses the fact that Beaudry was only bound to convey such title as he possessed, on the date the contract was executed, to the unpatented mining claims enumerated in the contract itself.

In order to convenience the Court in its consideration of this case we will quote from each part of the agreement where the properties are mentioned.

> "The said Fred Beaudry, the party of the first part, being the sole owner and in possession of certain gravel mines together with the timber, the improvements thereon and fixtures . . . . all located in Township 35 North of Range 8 West, Mount Diablo Base and Meridian, in Trinity County, Calif., including these certain mining claims and properties known as:
>
> Minersville No. 1.....160 acres more or less, patented
> Minersville No. 2.....160 " " " " "
> Minersville No. 3.....160 " " " " "
> Red Gulch....140 " " " " "
> Ridge .....160 " " " " "
> Gassy Hill ....160 " " " " "
> Head of Digger Creek...160 " " " " "
> Diener .....160 " " " " "
> Diener No. 2..160 " " " "*unpatented*
> Mule Creek Ridge .....160 " " " " "
> Long Gulch ...120 " " " " "
> Connection ... 40 " " " " "

Sweet Gulch ..160 acres more or less, *unpatented*
Little Mule
No. 2.....160 " " " " "
Strope Creek ..160 " " " " "
Little Mule ...160 " " " " "
Greenhorn Flat 160 " " " Receiver's Receipt
Greenhorn Flat
No. 2.....160 " " " " " "
Taylor Gulch..160 " " " " " "
Lane Gulch ...160 " " " " " "
containing a total area of 3160 acres more or less, of which 1260 acres have been patented by the United States Government.

"Now, therefore, Fred Beaudry, the said party of the first part, in consideration of one (1) dollar to him in hand paid, receipt of which is hereby acknowledged, does hereby grant to the said party of the second part an option to purchase the *above described mines and mining claims, lands and properties,* under the following conditions, to-wit:

"The party of the second part *will enter upon and take possession of the said properties,* except one house with furniture known as the Fourtlette House, yard and barn, and agrees and binds himself to expend not less than Ten Thousand ($10,000) Dollars in improvements on said properties, in the following manner:"

(*Trans. of Record, p.* 67-70.)

"The party of the first part hereby *grants the right to use all of said properties except that above reserved for the purpose of prospecting, developing and working said mines,* . . . . "

(*Trans. of Record, p.* 70-71.)

"*It is further agreed by the party of the first part to at once upon request of said party of the*

second part to make a good and sufficient deed for all of said properties, free from all incumbrances, ... "

(*Trans. of Record, p.* 72.)

"Said party of the second part further covenants and agrees to pay all expenses for prospecting, examining the mines and the title of said properties."

(*Trans. of Records, p.* 73.)

From the foregoing quotations, it will be easily discerned that no language was used, in the Contract of Sale, which imports an intention upon the part of Beaudry, when referring to the unpatented mining claims, to convey the lands or realty therein embraced. The agreement specifically states the condition of the several properties, and shows that some of the properties were patented by the United States Government, that upon others patent had been applied for, and upon still others that the claims were *unpatented* or merely *locations* upon mineral lands of the United States. There is nowhere expressed in the contract an obligation upon the part of Beaudry to patent the mining claims or locations or to perfect the pending applications for patent. In other words, the appellant was to take over the properties, if it did conclude to purchase them, in the same state and condition as they were in at the time the contract was executed.

The most careful investigation of the authorities has failed to disclose to us any decisions to the effect that, when a person undertakes to make a valid conveyance of an unpatented mining claim, he obligates himself to give a good, sufficient and valid title to the lands embraced within the boundaries of the mining claim or location. He does obligate himself, in such instances, to convey his right, title and claim to the possessory interest. The agreement itself discloses that both Beaudry and the appellant, in dealing with the unpatented mining claims, contemplated only such possessory interest as Beaudry held or had in the claims at the time the agreement was executed. The agreement refers to mining and personal property in which are embraced and included "*certain mining claims and properties.*" This language imports a distinction between the patented properties and the unpatented mining claims. The word properties, as used in the contract, was used in a general sense, but the character and present situation, nature of title and right of possession were expressly distinguished by the use of the words "patented" and "unpatented". The expression in the contract to the effect that "said party of the second part further covenants and agrees to pay all expenses for prospecting, *examining* the mines and the *titles* to said properties" demonstrates that the party of the second part, appellant herein, was to investigate the pos-

sessory title of Beaudry to the unpatented mining claims. Again, the contract provided that Beaudry was "at once upon request of the said party of the second part to make a good and sufficient deed for all of said properties, free and clear of encumbrances, with escrow instructions in accordance with the above stipulations and place the same in some bank in San Francisco or elsewhere agreed by both parties"; and that the appellant was to enter upon and take possession of the said properties for the purpose of examining, prospecting and working the same. It can scarcely be contended that any person, in possession of his faculties, would enter into a contract to convey mining properties as realty and land, included in which were unpatented mining claims, and then put it out of his power to reduce the unpatented mining claims to actual ownership of land and realty, by giving the proposed vendee exclusive possession of the properties. Yet, if the contention of the appellant was sound, this is exactly what Beaudry obligated himself to do, because the appellant was to have the immediate and exclusive control of the properties and of each of them and all of them and was to do and perform the annual assessment work upon the unpatented or possessory right mining claims. Such construction would permit the appellant to fail to do the annual assessment work for some year upon one or more of the unpatented claims; and, after having

exhausted the soil of its mineral value, attempt to rescind the contract and come into Court attempting to enforce a rescission upon the ground that title to one or more of the unpatented claims had failed. It must be borne in mind that the products of the mining properties were to belong exclusively to the appellant and that it had the right to work each and all of said properties, including the mining claims, in such manner as its judgment might determine. The use of the expression contained in the contract that the appellant was to examine the title of the properties is significant, when considered in connection with a statement of the status of the titles; the only practical way of examining the titles to unpatented mining claims is to ascertain whether or not the location has been made upon mineral land of the United States in accordance with the laws of the United States and the rules and regulations of the General Land Office. Title to a possessory interest in an unpatented mining claim is not the same as title to real estate or realty where the same is represented to be or is actually held in fee. The title to an unpatented mining claim or location is a right to the use and enjoyment of a particular piece of the Government domain, mineral in character, which has been located and is held in harmony and compliance with the laws and rules governing claims upon the government domain. The authorities all hold that a purchaser of an unpatented min-

ing claim can only acquire, by such purchase, such title or right as his vendor had *at the time of the sale.* Beaudry did not guarantee the value of the unpatented mining claims for gold or precious mineral products, but expressly allowed the appellant to take the exclusive possession of said properties for the very purpose of ascertaining and determining such values. It is nowhere alleged in the Amended Bill of Complaint that the mining claims were not located upon mineral lands belonging to the government of the United States and that such locations were not made in accordance with the laws of the United States and the rules and regulations of the General Land Office; and if the mining claims in question were so located and had been so held by Beaudry up to the time that he executed the agreement on the twenty-first day of July, 1906, it follows that he only obligated himself to convey such title as he then possessed, possessory in its nature, to the unpatented mining claims. If the Government refused to issue a patent for the mining claims upon the ground that it was not shown that they were chiefly valuable for mineral purposes, or that their mineral character had not been sufficiently demonstrated, it does not follow that Beaudry was bound in any respect to convey to the appellant the land or realty embraced within the boundaries of the claim or that he had guaranteed that patent could be secured, or would be secured, upon application therefor. However, if there should

prove to be any ambiguity or uncertainty as to the intent and purpose of the contracting parties, when dealing with the unpatented mining claims, such ambiguity and uncertainty is entirely removed when we come to consider the language contained in the Supplemental Agreement dated December 11th, 1909, and which is found on pages ninety and ninety-one of the Transcript of Record. Again, for the convenience of the Court, we quote such language:

> "It is further stipulated and agreed, that the party of the second part is to pay all expenses, fees, charges, and costs in connection with the decisions in the United States Land Office at Redding, California, and upon any appeal of the same to the Commissioner of the General Land Office, or the Secretary of the Interior, in the matter of application for patent of the Greenhorn Placer Mining Claims; said contests being now pending in the United States Land Office at Redding, California;
>
> "And it is further stipulated that the party of the second part is to do and perform on each, every and all of the *unpatented placer mining claims*, mentioned and particularly set forth in the contract of agreement of July 21st, 1906, the annual assessment work, labor and improvements, required by law, and the rules and regulations of the Department of the Interior, to be done and performed upon placer mining claims in order *to hold and maintain the possessory right and title thereto;* said labor and improvements to be furnished, done and performed, at the sole cost, charge and expense of the party of

the second part, and without any charge, cost or expense to the party of the first part."

This language clearly conveys the intention of both of the parties when dealing with the unpatented mining claims or locations. If it had been intended that Beaudry was to convey valid title to the realty and land, embraced within the mining locations, the contract would have provided that he was to acquire title thereto and cause patent to be issued therefor and to do and perform such things as were necessary to be done in order to put him in the position of being able to convey a valid title to land and realty. On the other hand, we discover that the appellant was to do and perform these things at its own cost, charge and expense, that it was to develop and work the mining claims so that patent therefor could be issued and sufficient proof made. The facts that the government, upon application for patent, refused to issue the same and that the property was, after the date of the contract, included within the Forest Reserve, do not, in any wise, alter the purpose and intent of the agreement or impose any new or additional obligations or duties upon Beaudry.

The appellant was in possession of the properties, knew their condition, could ascertain their value as mining properties and the status of the title to each and every claim. As far back as the tenth day of September, 1908, the appellant knew that certain proceedings adverse to the application for patent had

been instituted by the government; and yet the appellant remained in possession of the properties, continued to work and operate the same, and made partial payments for and on account of the purchase price and in all respects kept alive the option and the right to purchase the properties.

(*Trans. of Record, p.* 15.)

As far back as May 25th, 1910, there had been an adverse decision of the Register and Receiver of the Land Office at Redding in relation to the mineral character of some of the lands, and the said Register and Receiver adjudged that the mineral character of the land included in the Long Gulch Placer Mining Claim had not been sufficiently established. Notwithstanding this adverse ruling there was no attempt upon the part of the appellant to rescind the contract and neither was there any claim asserted by the appellant that Beaudry's title to the said mining claims had failed. On the contrary, the appellant continued in the possession of the properties, secured extension of time for payment and paid large sums of money although these facts were clearly within its knowledge.

(*Trans. of Record, p.* 16.)

The appellant lays stress upon the proposition that Beaudry in the contract of July 21st, 1906, used the expression that he was "the sole owner and in possession of certain gravel mines, * * * * * * in-

cluding these certain mining claims and properties." The expression "sole owner" was clearly used in its general sense and meaning and was not intended to declare that he was the owner in fee of the lands and realty embraced within the unpatented mining claims, because the subsequent provisions of the contract set forth definitely and descriptively the nature and character of his ownership and show that his ownership in a portion of the properties was qualified. It is apparent that Beaudry used the expression as it is usually and generally used in connection with the purchase and sale of unpatented mining claims; and the authorities show that the holder of a possessory right in unpatented mining claims is justified in referring to himself as the owner. The course of legislation and the decisions in the State of California have recognized a qualified ownership in unpatented mining claims.

State v. Moore, 12 Cal., 56.

"Persons claiming and in the possession of mining claims upon the public lands of the United States are, as between themselves, and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation of the land containing the mine."

Hughes v. Devlin, 23 Cal., 502.

"Claims to public mineral land are recognized as titles in this State—as legal estates of free-

hold, for all practical purposes—if we except some doctrine of abandonment, not, perhaps, applicable to such estates."

Merritt v. Judd, 14 Cal., 60.

The word "claim" in mining parlance, when employed as a noun, has a definite and particular meaning, denoting a particular piece of ground to which that miner has a recognized, vested and exclusive right of possession for the purpose of extracting precious metals therefrom.

Northern Pac. Ry. Co. v. Sanders (U. S.) 49 Fed. 129, 135; 1 C. C. A. 192.

" 'Mining claim' is the name given to the portion of the public mineral lands which the miner for mining purposes takes up and holds in accordance with mining laws, local and statutory. It is not merely a vein or lode, but with that a certain quantity of surface ground."

Mt. Diablo Mill and Mining Co. v. Callison (U. S.) 17 Fed. C. A. S. 919, 924;

Morse v. De Adro, 40 Pac. 1018, 1019; 107 Cal., 622.

Williams v. Santa Clara Mining Co., 66 Cal. 193;

Salisbury v. Lane, 63 Pac. 383, 384; 7 Idaho, 370.

"A mining claim is an estate of inheritance and subject to dower."

Black v. Elkshorn Mining Co. (U. S.) 49 Fed. 549, 550.

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent."

Sullivan v. Iron Silver Mining Co., 12 Sup. Ct. 555, 556; 143 U. S. 431; 36 L. Ed. 214.

From the foregoing authorities it will be seen that when Beaudry entered into the contract of July 21st, 1906, he referred to the *unpatented* mining claims in the same sense in which the phrase "mining claim" is usually and generally employed and commonly understood. We think it can not be seriously contended that Beaudry, in using the language contained in the agreement to the effect that he was the sole owner, etc., intended, or the appellant understood, that he was to give to the appellant, in case the properties were purchased, a title to the ground or land comprised within the boundaries of the unpatented mining claims.

The strongest construction which can be placed upon the language so used, when referring to the unpatented mining claims, is that Beaudry represented he had valid locations upon mineral land of the United States in a certain designated portion of

Trinity County; and that he would convey such rights as he possessed to said mining claims, provided that the appellant was satisfied, after investigation and research, with the value of the same for mineral purposes and with the title thereto.

The very words "mining claim" import purely a possessory interest and that the same is not held in fee and that the same has not been patented; because when the land has been reduced to ownership in fee and the ground has been patented, it ceases to be a mining claim and becomes patented mining ground, realty or land.

> "The purchaser of a mining claim can only acquire, by such purchase, such title or right as his vendor had *at the time of the sale.*"
>
> *Waring v. Crowe*, 11 Cal., 367.
>
> "The purchaser of a mining claim or public mineral land acquires what title the vendor had *at the moment of the sale.*"
>
> 27 Cyc. 678, and cases cited thereunder.
>
> "The words 'mining ground', when used in a deed have a technical meaning; and refer to that interest which a mere occupant of a mine has in the same; they are not the words used when a fee simple or leasehold interest in real estate is to be conveyed."
>
> 27 Cyc. 678, and cases cited thereunder.

We quite agree with the attorneys for appellant in their statement found on pages nineteen and twenty

of the Brief for Appellant, where they say that it is evident that they, meaning the parties to the contract of July 21st, 1906, used the term "mining claims" as contradistinguished from the physical properties themselves; and we also agree with the attorneys for appellant that the term "mining claims" was obviously intended to cover something in addition to what had already been covered by the term mines. The attorneys for appellant have unwittingly stated our exact position. It is obvious that both parties understood that they were dealing with lands and mines which had been patented and in which the fee was vested in Beaudry and were dealing with unpatented mining claims in which the fee was not vested in Beaudry and in which he only had and held a possessory interest. Appellant contends that had the parties intended to deal with mining prospects represented merely by Beaudry's possession, the recitals as to whether the claims were patented or unpatented would have been unnecessary and immaterial. How this conclusion can be reached is not apparent to us. It was the fact that the parties were dealing with unpatented mining claims as well as patented lands that necessitated and rendered very immaterial the use of the descriptive adjectives. Had the parties been referring only to patented lands to which Beaudry held the fee and had not been dealing with unpatented mining claims, then the use of the descriptive

adjectives would have been entirely unnecessary and immaterial. A person purchasing unpatented mining claims or locations is presumed to deal with the situation as he finds it. It is presumed that he knows and understands that the only right which the proposed vendor has in unpatented mining claims is a possessory right; that is the right to use and occupy the ground, comprehended within the boundaries of the claim, to extract the gold and other precious metals therefrom, and to use and enjoy the particular land located as long as he shall comply with the laws and rules applicable to mining claims and keep alive his possessory interest. Just such matters were in the minds of the parties to the contract of July 21st, 1906, when they inserted the following language in the instrument, to-wit:

> "It is hereby granted to the said party of the second part an option to purchase the above described *mines* and *mining claims, lands and properties.*"

That such ideas were in the minds of the parties is manifest when we come to consider that the parties were dealing with actual mines, with other lands, with personal property and with *mining claims.* If the parties had held any other intention all of the properties in question would have been referred to by government subdivisions or other particular description and designation and all use of descriptive

adjectives would have been useless and superfluous

The appellant knew the condition of the properties knew that there were mining claims and possessory interests involved in the contract of option and went into possession of the properties for the very purpose of investigating the said properties as to their mineral value and as to the validity of title. The decisions of this and other states and of the United States Courts hold that when persons are dealing concerning mineral claims and mineral property that they must be presumed to contract with reference to the facts known to both. A contract to convey unpatented mining claims is in many respects entirely dissimilar from a contract to convey realty or land which is held in fee. It would be a very peculiar state of the law to hold that when one contracted to convey a mining claim, which was located upon mineral ground of the United States that he had contracted to convey the fee title to the property or that he had guaranteed the mineral character of the same. A mining claim is validly located when a discovery of a ledge is made or of rock in place bearing gold, silver, or other precious metals, and the location is made upon mineral land of the United States, the end lines and corners established, notice posted, etc. The same general rules apply to placer ground; that is, when a location is made upon mineral ground of the United States and the ground is found to be composed of auriferous

gravel, or of soil or earth bearing gold and other precious metals. It would be an entirely different proposition, perhaps, if location was attempted upon non-mineral ground belonging to the United States; but in this case there is no such contention because the mining claims in question were located upon mineral land belonging to the government of the United States. Beaudry made no guarantee as to the value of the placer claims or the extent to which they carried auriferous gravel or gold bearing earth or soil.

> "An option on, or contract for the sale of, mineral property is construed so as to carry into effect the intentions of the parties, according to the general rules applicable to such contracts, and the *parties must be presumed* to have contracted with respect to the *facts known to both*, and the contract will be construed accordingly."
>
> 27 Cyc., 672 and cases cited.

If such be the situation, then the case of La Grange Inv. Co., v. Shaw, 72 Pac. 795, cited by appellant in its Brief is not at all applicable. In that case fraud was claimed and the whole contest centered upon the defendant's allegations of misrepresentations and fraud in inducing him to sign the contract. It is difficult to determine from a reading of the case what were the exact facts, but it does appear that the plaintiff represented that it was the owner of an undivided half interest in the quartz and placer mining claims

purporting to be described in the deed placed in escrow; that it was the owner of a contract, the same being a contract for the title to the other undivided one-half interest in and to all of said mining claims, and that each and all of said claims were good and *valid locations of mining claims, upon lands subject to said location*—that is to say, that each of said quartz claims contained a vein of quartz in place, bearing gold or other precious metals; that said vein had been discovered within the boundaries of each of said mining claims, and that each had been duly and regularly located, and the proper record made thereof, and that the placer mining claims mentioned and described were good placer locations, *made upon mineral ground.* It appears that the locations were not made upon mineral ground and that there were other false and fraudulent representations. Such being the situation, we do not see where appellant can obtain any consolation from the case which it has cited and which appears to be the only case cited by it in connection with the law applicable to mining claims. There is absolutely no parallel between the case of La Grange Inv. Co. v. Shaw, supra, and the case under consideration by the Court.

Appellant seems to have entirely lost sight of the proposition that it had an option to enter in and upon the properties on and after July 21st, 1906, for the purpose of prospecting, developing and working the

said properties and that no payment was to be made for or on account of purchase price until August 10th, 1907, when the sum of Ten Thousand Dollars was to have been paid. In other words, Beaudry gave to the appellant, or to its predecessors in interest, the right to enter in and upon the properties and each of them and all of them, examine, prospect and develop the same and ascertain their value for mineral purposes and also to examine the mines and the title thereto; which right continued for the period of more than one year before any payment was to be made for and on account of purchase price. The appellant, and its predecessors in interest, well know the conditions and had an opportunity to prospect and examine the title to the properties and to examine and investigate the title to the mining claims; and did enter upon the properties and did carry on such investigations for a period of more than one year before any payment was to be made on account of purchase price. During this year the appellant must have satisfied itself that the properties were valuable for mining purposes and that the title of Beaudry to the mining claims was a good possessory title. Otherwise they would not have made the first payment on account of purchase price and converted the option contract into one of sale and purchase. Furthermore, the appellant entirely overlooks the proposition that it was never disturbed in the use and occupation of the min-

ing claims and any of them and that the government did not, by the ruling of its Department, deprive it of any beneficial interest in the mining claims in question. The refusal to issue patent until it was demonstrated that the lands in question were more valuable for mineral than for other purposes does not become an element in the case. In every instance, where patent is applied for, proof must be made that the land sought to be secured from the Government is chiefly valuable for mineral. The appellant could have exhausted the mineral contained in the soil of the mining claims and it would then have become impossible for either Beaudry or the appellant, or any one else, to have secured title to the ground as mineral or placer land; yet the appellant could have derived all of the beneficial interest accruing from the working of the ground as hydraulic or placer ground.

It is extremely significant that no fault was found with the situation until the executrix of the last will and testament of Frederic Beaudry demanded the payment of the last installment of purchase price; and then, and only then, and upon the day preceding the date when last payment was due, the appellant undertook to rescind the contract on the ground that title to some of the mining claims or locations had failed. The fact that Beaudry, or his executrix, expressed the hope and belief that patent to the mining claims could be ultimately secured, does not in any-

wise change the situation or impose any new or additional obligations upon Beaudry or his executrix. It is reasonable to suppose that Beaudry believed that patent would be ultimately secured to the mining claims, when the same had been developed, for the reason that he had secured patents to a large number of acres of government ground lying in the same district, contiguous to and practically a part of the ground comprised within the mining claims or locations. Finally, the appellant having satisfied itself with the character of the properties in question, having determined to its satisfaction the mineral value thereof, and having determined to its satisfaction the title of Beaudry to each and all of the properties mentioned in the contract, and having converted the option into a contract of sale and purchase, can not now, after many years have elapsed and it has had possession of the property, extracted the values therefrom and used it as its own in every respect, be heard to say that it is entitled to rescind. Such determination, we respectfully submit, would be inequitable and unjust. The appellant was given its full year, full measure of time, in which to determine whether or not it wished to take over the properties of Frederic Beaudry as they stood, title and mineral character included, at the date of the contract of July 21st, 1906.

We believe that this Honorable Court will determine from the conditions which attain in this particular case that the appellant was not entitled to rescind its contract and that it is not entitled to have declared upon the property of the Deceased an equitable lien for Three Hundred and Four Thousand, One Hundred and Sixty-nine Dollars, with interest, etc.

We now proceed to consider the second proposition; that is, in attempting to rescind the contract did the appellant substantially comply with the rules governing rescission? We submit that the appellant did not comply with the rules governing rescission of contracts, in any substantial respect. The rules are very simple and easily understood.

A person desiring to rescind a contract must do so promptly, upon discovering the facts which entitle him to rescind; he must restore to the other party *everything* of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. In other words, he must make an unqualified offer to restore everything of value which he has received under the contract, without any qualifications or limitations other than that the second party shall do likewise. No such offer was made by the appellant. It had been in possession of the mining properties, extracted gold and other precious metals

therefrom, and was, at the time of the commencement of this suit, in the possession of the properties and each of them and all of them. It claims to have paid in excess of Three Hundred Thousand Dollars upon its contract with Beaudry in direct cash payment and in moneys expended under said contract in the development of said mining claims, but it does not appear what amount of gold or other precious metal had been extracted from the properties by the appellant. On the thirty-first day of December, 1912, the appellant caused to be served upon the defendant, Angele Beaudry, as executrix of the last will and testament of Frederic Beaudry, Deceased, and as sole devisee under the said last will and testament of said deceased, a Notice of Rescission wherein and whereby the appellant notified the said Angele Beaudry, as such executrix and as such devisee, that it did rescind the said contract of July 21st, 1906, because of such failure of consideration and did offer to restore to the said Angele Beaudry, as said sole devisee, and as said executrix, everything of value which had been received under the said contract, upon condition that the said defendant, Angele Beaudry, as such devisee and executrix, do likewise; but the appellant did not stop there. It immediately proceeded to qualify its offer of rescission and of restoration, and did provide that the amount to be paid to it by Angele Beaudry, as such executrix and such devisee, was to be the sum

of Two Hundred Thousand Dollars, provided that said offer was accepted on or before the sixth day of January, 1913; otherwise, that the appellant demanded as a condition for the restoration of the property of Frederic Beaudry, that Angele Beaudry, as such executrix or such devisee, should pay such additional sums as the appellant might be entitled to. The offer to rescind does not indicate that the appellant was either able or willing to restore all that it received of value. There is no statement of the amount of gold or other precious metal extracted by it from the soil of the properties. There is a demand that there be repaid to the appellant all of the moneys expended by it in the working and development of said property. Certainly neither Beaudry nor his estate was under any obligation to return to the appellant, even if rescission was warranted, anything more than the money he had received on account of purchase price and the sum of Ten Thousand Dollars which were expended for improvements of a definite character and kind, as per the terms of the contract. The property was not in a condition to be restored to the estate of Beaudry, because the appellant, and its predecessors in interest, had worked and mined the property from July 21st, 1906, up to and including the date that rescission was offered. The appellant and its predecessors in interest had mined the property for a period of six years and a half, and had been

in possession of the very mining claims concerning which this controversy exists. The facts stated in the Amended Bill of Complaint show that appellant had despoiled and changed the property, so that it was unable to restore it, and therefore was not in a position to rescind, and has no action in equity.

Bailey v. Fox, 78 Cal., 389, 397;
Civil Code of Cal., Sec. 3407;
Civil Code of Cal., Sec. 1691, Subdivision 2.

"Where a party can not or does not restore the other party to the condition he would have been in but for the contract, rescission is not allowable."

Jones v. Bay Cities, etc., Co., 22 Cal. App. Reps. 81.

By continuing to act under contract until the executrix demanded payment of the balance of the purchase price and by continuing to take the gold out of the soil for several months after knowledge of all facts regarding conditions of title, appellant waived all right to rescind, and by its laches lost all right to rescind, if any it ever had.

Civil Code of Cal., Sec. 1691;
Burke v. Levy, 70 Cal., 250, 254;
Bailey v. Fox, 78 Cal., 389;
McGue v. Rommel, 148 Cal., 539;
93 U. S. 55;
192 U. S. 252.

The facts stated in the Amended Bill of Complaint clearly show that it was never the intention of the appellant to rescind because of the rulings of the Department of the Interior concerning the mining claims, and that rescission was an after thought, the offer to rescind not having been made until demand had been made for the payment of the balance of purchase price.

(*Trans. of Record*, pp. 30, 31, 32 and 33.)

The appellant did not rescind promptly upon discovering the facts which it claims entitled it to recind.

The very fact upon which the appellant bases its right to rescind was fully known to it on the first day of October, 1912, and as a matter of truth was practically known to the appellant for several years prior thereto. Notwithstanding the absolute knowledge of appellant, it continued in possession of the properties, continued to mine the same and extract gold and minerals therefrom and exercise full acts of dominion thereover. From the first day of October, until the thirty-first day of December, the appellant remained absolutely silent, made no effort to rescind, asserted no claims against the estate of Frederic Beaudry, Deceased, continued in the possession of the property, carried on and conducted its mining operations, and never once suggested that it was entitled to rescind or that any circumstances had developed which entitled

it to a rescission. And it was not until notice had been served by the Executrix of the Estate of Frederic Beaudry, Deceased, that she would require the final installment of purchase price to be paid on the first day of January, 1913, that any action was taken by the appellant, and then no action was taken until the thirty-first day of December, 1912. The only excuse offered by the appellant for its failure to rescind promptly is that no officers of the Corporation were present in the State of California until about the twenty-second day of December, 1912. It was not necessary for any officer of the Corporation to be in California in order to offer a rescission, and it was not necessary for any officer of the Corporation to be in California in order to accomplish a rescission. Offers to rescind, as was the fact in this instance, are usually in writing, and it does not appear that there was any difficulty presented to the appellant in writing to the Executrix or telegraphing to the Executrix to the effect that the agreement or contract of July 21st, 1906, was rescinded by reason of the failure of title to some of the mining claims. Absolutely, no reasonable or valid excuse is offered for the failure of the appellant to rescind promptly upon discovering the facts entitling it to rescission. The appellant could not gamble with the situation; it could not wait to ascertain whether or not the Executrix of the Estate of Frederic Beaudry intended to

demand the final payment. The whole course of conduct of the appellant indicates most strongly that its action was taken solely because demand had been made for the final payment. The very nature and character of the property involved demanded the utmost good faith upon the part of the appellant and the utmost promptness in rescinding the contract. This rule has been repeatedly laid down and adhered to concerning contracts applicable to mining claims and mining property.

> "The Answer alleged laches on the part of Plaintiff, as a bar to the right to rescind. The finding was that the plaintiff was not guilty of laches in demanding rescission or in bringing the suit. We think this finding is contrary to the law and the evidence. A person having a right to rescind must make the offer promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind."
>
> *Garstang v. Skinner*, 165 Cal., 727;
>
> *Barfield v. Price*, 40 Cal., 542;
>
> *Burkle v. Levy*, 70 Cal., 254;
>
> *Bailey v. Fox*, 78 Cal., 389;
>
> *Harrington v. Patterson*, 124 Cal., 542.
>
> "A prompt disaffirmance of a contract by one entitled to rescind upon discovery of the facts entitling him to rescission, is essential. If he fails to act promptly, and continues to treat the contract as binding, he will be held to have

waived his right to rescind and to have elected to affirm the contract.

"Whether a person entitled to rescind has acted promptly is a question to be decided by the Trial Court upon the facts of the particular case. The evidence in this case is of such a nature as to support a conclusion that the vendee, with full knowledge of the facts, was not ready to end the contract, and that, continuing to treat the same for his own purpose as valid and binding, he failed to make known any desire to terminate the contract for such a length of time and under such circumstances as to preclude the exercise by him of any right of rescission."

Cross v. Mayo, 167 Cal., 594.

We do not address ourselves to the authorities contained in Appellant's Brief, on the question of rescission, for the reason that in general they state the law, but they do not modify any of the rules regarding rescission which we have heretofore set forth. The statement that the appellant endeavored in every way, by negotiations with the appellee, Angele Beaudry, to discover some means of enabling said executrix to complete the title, which is offered by the appellant as an excuse for its delay in offering to rescind, is absolutely absurd when we come to consider that the appellant alleges in its Amended Bill of Complaint that it knew on the first day of October, 1912, that it would be impossible for the title to said properties to be perfected. This statement is merely offered as an excuse, and is not a reason for the appel-

lant's action. Especially should prompt ness and ex pedition be shown when the rescission is claimed against the Estate of a deceased person, which estate is in course of probate. The law requires the utmost promptness in relation to the presentation of claims and the assertion of rights against the estates of de ceased persons. The appellant well knew that the executrix could not act upon the offer of rescission without the consent and approval of the Court and after certain proceedings had been instituted and orders obtained by which the executrix would be able to act upon the question of rescission.

Finally, we respectfully submit that the appellant in its Amended Bill of Complaint, has failed to disclose that it has been injured, or damaged, or sustained loss, in any respect; and it does disclose that it had possession of the properties and all of them with a right to remove the gold and other precious metals and enjoy the entire beneficial use thereof. There is no showing or claim that the appellant was ever disturbed in its possession, or will ever be disturbed. The rulings of the Department of the Interior did not in anywise seriously or injuriously affect the appellant. Each and every one of the mining claims could be worked and operated by it and the gold extracted therefrom; it was entitled to all of the use and enjoyment of the property, as much and as fully as it would have been able to use and enjoy the

property had patent been issued therefor; especially in so far as it applies to the working and operation of the property for placer mining and hydraulic purposes. Having used and enjoyed the property for a period of six years and upwards, having had complete and undisturbed possession thereof, having carried on and conducted mining operations and extracted the gold and values therefrom, having known the conditions in relation to some of the unpatented claims, having secured extensions of time for the payment of installments of purchase price, having converted the option into a contract of purchase and sale, with full knowledge of conditions as to mineral value and title, having the complete control of the mining claims and locations and being charged with the duty and responsibility of developing the same and performing the assessment work and making the improvements thereon, having waited for a long period of time after having discovered each and every fact claimed by it to entitle it to a rescission; nevertheless, the appellant now endeavors, because it was called upon to make final payment of purchase price, to rescind the contract and to return to the Estate of Frederic Beaudry a property which has been worked by the appellant, according to its own methods and manner, whether wisely or unwisely, and whether the values have been entirely extracted or not, and seeks to enforce an equitable lein and claim against the estate of a de-

ceased person in an amount upwards of Three Hundred Thousand Dollars.

We respectfully submit that there is nothing in the Amended Bill of Complaint which shows that the appellant is, or ever was, entitled to rescind the contract, or which shows that it was ever unfairly or unjustly dealt with; and there is not the slightest charge of fraud against the deceased or his executrix, but, on the contrary, there is every showing that the appellant was placed in a position to make such investigations of title and character of land as would enable it to satisfy itself and determine the advisability of making the purchase.

Such being the conditions, we respectfully submit that the District Court did not err in granting appellee's Motion to Dismiss the Amended Bill, and we further submit that the judgment should be approved.

Dated; San Francisco, Cal., Nov. 14th, 1914.

Respectfully submitted,

THOMAS B. DOZIER,

Attorney for Appellees.